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Nos. 79-1738, 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW, and
ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER NIXON'S RESPONSE TO HALPERINS' MOTION TO INTERVENE AND FOR OTHER RELIEF

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After years of inaction while this litigation progressed through the lower courts and ultimately to this Court for review, the Halperins have filed a motion seeking the status of full-fledged parties to the case. This motion is also made the vehicle for a last minute attempt to have the writ dismissed as improvidently granted.

These requests are rationalized primarily on the basis of an agreement brought to this Court's attention by the parties more than a year ago in which former President

Nixon and respondent A. Ernest Fitzgerald fixed the amounts that were to be paid to Fitzgerald depending on this Court's disposition of the appeal. However, this agreement provides no basis either for dismissal of the writ or for the Halperins' intervention. The Nixon-Fitzgerald agreement continued the controversy between the parties over whether Mr. Nixon is liable to Mr. Fitzgerald for the claims asserted against him in this action. It has no effect on the prudential factors that make the case appropriate for discretionary review—the recurrent nature of the absolute immunity issue and its importance. Rule 17, Supreme Court Rules. Nor does it confer on the Halperins any interest in the *Fitzgerald* case, much less the kind of concrete interest needed to satisfy the strict standards applicable to attempts to join litigation for the first time in this Court.

1. *The Agreement.*—Petitioner and respondent disclosed the existence of their agreement to the Court nearly a year before the Court granted the petition. Joint Statement of the Parties, No. 79-1738 (filed June 10, 1980). It was evident in the Joint Statement's description of the agreement that the parties had fixed minimum and maximum recoveries and had, in the interest of providing a greater degree of certainty to both parties, provided for *some* payment to Mr. Fitzgerald. This was, we submit, a perfectly normal contractual limitation of liability which preserved dispositive legal issues for further litigation and not, as the movants claim, "a wager . . . on an issue which Nixon has largely conceded to Fitzgerald" (Motion, p. 9). Whether the payment was to be prospective—*i.e.*, with funds being transferred only after this Court's disposition of the case—or whether the minimum amount due was to be paid immediately upon execution of the agreement was then, and is today, of no relevance whatever. In order to avoid the inevitable filing of strike suits generated by the very kind of publicity that attended the Halperins' submission of their motion, the size of the minimum payment and the total amount payable if Mr. Fitzgerald were to prevail

were not disclosed and, in fact, were the subject of a confidentiality undertaking.[1]

Mr. Nixon did not by entering the agreement "concede" in any respect the issue of absolute immunity. The agreement explicitly stated that it did not constitute a concession by either party on any question in the case. Moreover, the circumstances under which the agreement was negotiated dispel any implication to the contrary.

The district court denied former President Nixon's motion for summary judgment based on absolute immunity on March 26, 1980. A firm trial date of June 4, 1980, had been set some time before, and the busy trial judge (Gesell, J.), having cleared his calendar for a trial likely to last more than one month, made clear his commitment to that date.

Mr. Nixon exhausted all conceivable means of obtaining immediate appellate review of the denial of his absolute immunity defense and a postponement of the trial. On April 11, he filed a notice of appeal from that ruling and also sought leave to pursue a discretionary appeal under 28 U.S.C. § 1292(b). On April 15, he requested a 30-day continuance of the trial to await this Court's decision on whether it would grant a writ of certiorari in *Halperin* v. *Kissinger*, No. 79-880. However, in orders issued on April 18, the district judge both refused to certify an interlocutory appeal and denied Mr. Nixon's request for a temporary stay of the trial. Shortly thereafter, the trial judge communicated directly with the court of appeals and urged it to rule "with expedition" on Fitzgerald's motion to dismiss Mr. Nixon's appeal on absolute immunity.[2] The court of appeals dismissed that appeal on April 30, 1980.

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[1] It is our understanding that the respondent is submitting the agreement as an exhibit to his response to the Halperins' motion.

[2] See Memorandum to Chief Judge Wright from Judge Gesell (April 24, 1980) (attached as Exhibit A).

Mr. Nixon filed his petition for certiorari to review that order on May 2, 1980, together with a motion for expedited consideration. Nevertheless, Mr. Nixon had no assurance, short of action by this Court, that he could be spared the burden of a trial. He was squarely confronted with the prospect of incurring the expense, in terms of both time and money, of more than two months of trial preparation and the trial itself, costs he never would recover even if this Court were later to decide that a President is entitled to absolute immunity in civil damage actions. These costs would, moreover, have constituted an irreparable impairment of at least one "underlying purpose" of the absolute immunity defense, which is "to grant [its beneficiaries] the right not to be subjected to trial." *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1207 (3d Cir. 1979), *cert. denied*, —— U.S. —— (June 29, 1981).

It was in this no-win situation, where he could neither avoid nor recoup much of the expense against which absolute immunity was designed to protect, that Mr. Nixon concluded an agreement with Fitzgerald.[3] From Mr. Nixon's

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[3] The agreement provided for a payment to Fitzgerald of $142,000 regardless of the outcome of the case, a fraction of the amount fixed by Fitzgerald's expert as his compensatory damages and an amount comparable to the likely costs of litigation. Even as to this figure, Mr. Nixon's obligation under the agreement was to be reduced, up to $42,000, by whatever amounts Fitzgerald might be able to obtain from Mr. Nixon's co-defendants. The agreement also established that Fitzgerald would receive an additional $28,000 depending on the outcome of the appeal.

The agreement was reached in the early morning hours of May 19, the Monday after both the *Halperin* and *Nixon* petitions for certiorari had appeared on the Court's conference list, but several hours before the announcement as to their disposition. The parties' mutual uncertainty under these circumstances as to the future course of the litigation provided the setting for an agreement satisfactory to both parties, which would create a degree of certainty on the amount in controversy while continuing the dispute on the issue of liability.

perspective, the agreement made the best of this bad situation by preserving the opportunity to litigate his entitlement to absolute immunity while limiting his exposure to an amount comparable to the unrecoupable litigation expenses he was on the verge of incurring in any event. To characterize such an agreement, which continued litigation on absolute immunity when that right was threatened with irreparable damage, as a concession is particularly ironic and unjust.[4]

After the agreement was concluded, the parties disclosed its substance to the trial judge in chambers and, on the basis of this circumstance and this Court's grant of certiorari in *Halperin,* he stayed further proceedings in the trial court on May 22, 1980. Shortly thereafter, as has been noted, the parties informed this Court of the agreement in their Joint Statement filed June 10, 1980.

The Halperins belittle the additional $28,000 which is contingent on this Court's ruling on the validity of Mr. Nixon's absolute immunity defense, but cannot suggest that the amount is so trivial that the litigation is no longer an actual controversy. *See, e.g., Roe* v. *Wade,* 410 U.S. 113 (1973) (and cases cited therein). The sum in controversy is clearly important to the parties, and this Court has frequently decided important legal issues involving much less in terms of monetary interests. *Thompson* v. *City of Louisville,* 362 U.S. 199, 203-04 (1960) ($20 fine for loitering). The point of paramount importance is that the issue of absolute immunity merits review in this Court because it is of great continuing significance to the Presidency, the public generally, and the petitioner.

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[4] The agreement was put in a form common in personal injury actions. Often an insurer and a plaintiff who strongly disagree on the issue of liability, but who at the same time do not wish to run the risk of an open-ended damage award, agree on the maximum potential liability in exchange for a guaranteed minimum, and then litigate only the issue of liability.

The agreement did put a fixed amount in issue in place of an unresolved controversy regarding Fitzgerald's actual damages. However, that amount can be won or lost only through the usual form of argument based on the record below and generally applicable principles of law. The parties are involved in a "wager" only in the sense that any two litigants who argue that a fixed money judgment should be affirmed or reversed are gambling on this Court's ruling on an issue of law. The agreement contemplates that the parties will actively attempt to prevail on whatever issues are properly raised in this Court, and they continue to do so.

2. *The Intervention Request.*—The Halperins' motion fails totally to identify any cognizable interest that would justify making them parties to this case. Their case bears no factual relation to Fitzgerald's, and they will not be bound by a judgment in his suit. Nor can they point to any "interest relating to the property or transaction which is the subject of [this] action" that would be "impaired" or "impeded" by any particular disposition of this case. See Rule 24(a), Federal Rules of Civil Procedure. They simply have no concrete stake in this case comparable to that of every other litigant that has been allowed to intervene as a party in the first instance in this Court.[5]

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[5] *E.g., Banks* v. *Chicago Grain Trimmers Assn.*, 389 U.S. 813 (1967), 390 U.S. 459 (1968) (beneficiary of workmen's compensation award allowed to intervene in case involving validity of that award); *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952) (real parties in interest allowed to intervene after standing of representative party questioned); *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194, 198 n.5 (1944) (party to administrative proceeding who was denied notice of initiation of judicial review allowed to intervene); *National Labor Relations Board* v. *Acme Industrial Co.*, 384 U.S. 925 (1966), 385 U.S. 432 (1967) (union allowed to intervene to litigate existence of employer's duty to bargain with it). See Stern & Gressman, *Supreme Court Practice*, at 436 (5th ed. 1978).

The Halperins' only "interest" in the *Fitzgerald* case is their concern that a ruling on an issue of law in that case may be given effect, through the doctrine of *stare decisis*, in their otherwise unrelated case. The Halperins share this legally insufficient "interest" with actual and potential litigants nationwide. This Court chooses its cases precisely so that it can resolve unsettled questions of law that are or will be presented in other cases. To our knowledge, it has never been suggested that a litigant's concern that a ruling by this Court will be applicable in its case alone justifies its intervention as an actual party here.

The Halperins' request for party status is also based on an asserted need to argue—following a remand to the court of appeals—(1) that a form of absolute immunity covering Fitzgerald's claims, but not theirs, should be recognized (Motion, pp. 5, 7), (2) that the facts of Fitzgerald's case do not give rise to an implied right of action (*id.* at 5-7), and (3) that any speech on which Fitzgerald's claims are based was not protected by the First Amendment (*id.*). Even if arguments, unsupported by interests, could furnish a basis for intervention, these would not fill the bill.

A remand to the court of appeals for reconsideration of the absolute immunity issue would serve no purpose and would impose gratuitous expense on the parties. The court of appeals dismissed Mr. Nixon's appeal, which raised only that question, on the basis of Fitzgerald's contention that the denial of Mr. Nixon's absolute immunity defense did not present a "serious and unsettled question" in light of the court of appeals' decision in *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). See Motion of Appellee to Dismiss for Lack of Jurisdiction, or, in the Alternative, for Summary Affirmance, pp. 5-8 (filed April 24, 1980). There have been no subsequent developments remotely suggesting that the court of appeals would now be willing to reverse field on an issue that it apparently did not previously regard as even "serious" or "unsettled." The distinction that the Halperins suggest might be drawn between

their case and this one can be found nowhere in the language or reasoning of that court's ruling in *Halperin*. The case is properly in this Court and should be decided without further proceedings below.

Mr. Nixon argued repeatedly in the district court, albeit without the Halperins' assistance, that Fitzgerald had no implied right of action. Those arguments were rejected. See, *e.g.*, Appendix A to the Petition in No. 79-1738, p. 1a. Taking his appeal only on the "collateral order," Mr. Nixon limited his notice of appeal to the issue of absolute Presidential immunity. However, it is our understanding that petitioners Harlow and Butterfield will brief and argue in this Court the issue of whether Fitzgerald has any implied right of action. The Halperins' participation in argument on this point is unnecessary.

With regard to the status of Fitzgerald's First Amendment rights, Mr. Nixon's position remains that Fitzgerald was not punished by anyone for engaging in protected speech. However, that issue could not be put in a form suitable for summary judgment in the district court by either party and its merits are not, therefore, reviewable in this Court or the court of appeals.

CONCLUSION

For the reasons set out above, the Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief should be denied in its entirety.

Respectfully submitted,

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APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA
Washington, D. C. 20001

Chambers of
GERHARD A. GESELL
United States District Judge

April 24, 1980

MEMORANDUM

To: Chief Judge Wright

From: Judge Gesell

Re: A. Ernest Fitzgerald v. Alexander Butterfield, Richard Nixon, and Bryce Harlow, Appellants, Nos. 80-1406, 80-1407, and 80-1408

I am advised that defendants Butterfield, Nixon, and Harlow have noted appeals from my Order dated March 26, 1980, denying their motions for summary judgment, and that plaintiff has filed in your Court a motion to dismiss these appeals or, in the alternative, for summary affirmance, and a motion for expedited consideration.

This six-year-old case is now scheduled for three pretrial conference beginning May 2, 1980. A jury trial, scheduled last September to commence on June 4, 1980, is expected to last one month. I respectfully request, pursuant to paragraph IX.D.1.d of the Court's *Handbook of Practice and Internal Proceedings,* that the above-mentioned motions be handled with expedition. I would also seek authorization from your Court permitting me to

conduct the pretrial conferences as previously arranged. If the scheduled pretrial proceedings are postponed, the trial of the case will have to be delayed many months.

/s/ GAG

cc: George A. Fisher, Esquire
Clerk of Court

Curtis E. von Kann, Esquire
Mark S. Landman, Esquire
R. Stan Mortenson, Esquire

Counsel